No. G062327

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION 3

MOJAVE PISTACHIOS, LLC, a California limited liability company, and PAUL G. NUGENT AND MARY E. NUGENT, Trustees of the Nugent Family Trust dated June 20, 2011

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a California joint powers authority; THE BOARD OF DIRECTORS OF THE INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a governing body,

Real Parties in Interest.

Appeal from the Superior Court of the
State of California for the County of Orange
The Honorable William D. Claster | Case No. 30-2021-01187589

AMICUS CURIAE BRIEF TO REPLY TO REAL PARTY IN INTEREST'S RETURN ON WRIT

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CALIFORNIA BUILDING INDUSTRY ASSOCIATION AMICUS CURIAE BRIEF

The issue regarding whether a public agency can disproportionately allocate a fee based upon its discretionary determination of users is of concern to the California Building Industry Association (CBIA). Homebuilders rely on certainty in planning housing development in a time where California faces a housing crisis.

Before the Court is a novel question of law. (Petition for Writ [Petition] at 19-21, 37-46.) Can a landowner with overlying water rights suddenly be determined to have no right to groundwater by an agency who then allocates all of the landowner's water to other pumpers in the basin, and then adopts an unaffordable fee that only applies to a few landowners? In so doing, the agency decision shifts to the landowner the entire burden for basin management, and to other users the benefit, by requiring that a few landowners fund the importation of supplemental water into the basin to benefit all landowners.

The Sustainable Groundwater Management Act (SGMA), as it applies to property owners, did not give the SGMA groundwater sustainability agency, here the Indian Wells Valley Groundwater Authority (GSA), such unfettered discretion. In exercising its discretion improperly, the GSA's allocation violates the rough proportionality tests of *Nollan* and *Dolan*. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 837 (*Nollan*) [actual condition imposed must have a "nexus" to the impact of the project]; *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*) ["rough proportionality" must exist between the size of a condition and a development's social costs.]; see also Petition at 40-41 ["Because Real Party determined that Petitioners had no right to native groundwater, evidenced by having zero Annual Pumping Allocations or access to native water via the TPFP [Transient Pool and Fallowing Program], Petitioners are one of only two parties in the entire Basin that must therefore pay the

Replenishment Fee to import non-native groundwater for use on its Basin lands, at an unprecedented $2,130 per AF."].)

The allocation and the fees are contrary to law. In *Alliance for Responsible Planning v. Taylor* (2021) 63 Cal.App.5th 1072, the Third District held a General Plan Amendment was unconstitutional because it allocated more than a project's fair share to proportional project traffic impact by requiring an owner/developer of a single project to be solely responsible to pay for construction of all road improvements necessary to bring traffic volume within acceptable levels of service. There must be a rough proportionality between the property the government demands and the social costs of the applicant's proposal.

The *Alliance* court noted that "an unlawful condition need not only be for land – demands for money can also violate *Nollan-Dolan*." (*Alliance, supra*, 63 Cal.App.5th at 1085 [citing *Koontz v. St. Johns River Water Management District* (2013) 570 U.S. 595, 605-606 [the government may not leverage its interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to a projects impacts]].)

Here, Real Party GSA attempts to dilute the effect of its reallocation of water rights by imposing a fee upon the landowner, claiming one of two things: first, the landowner can pay an exorbitant fee to get new water, or second, even if they want to challenge the reallocation, they must first pay the fee despite it being excessive: $2,130 per acre-foot, or approximately $10 to $12 million dollars per year until the matter is resolved. This violates the unconstitutional conditions doctrine. (*Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394 [in the context of land-use exactions established in *Nollan* and *Dolan*, the county failed to make an individualized determination that an "essential nexus" and "rough proportionality" existed between the traffic impacts caused by or attributable to his project and the need for improvements to state and local roads thus violating rough proportionality test and the "unconstitutional

conditions doctrine"]; see also *Ballinger v. City of Oakland* (9th Cir. 2022) 24 F.4th 1287; see also *Knight v. Metropolitan Gov't of Nashville & Davidson et al.* (6th Cir. 2023) 67 F.4th 816.) Here, in the same way, the "fee" assessed has not been shown to be even remotely proportional to Petitioner's burden on the basin.

If the ruling stands, landowners may receive project permits, but then face a SGMA agency who could declare a zero water allocation to their project from a particular water basin. More egregiously, the SGMA agency could insulate this zero allocation from legal challenge by tying it to a prohibitively expensive tax (here, i.e., for 1600 acres, the fee is equivalent of tax amounts to approximately $10M per year) to continue to pump water from beneath their own land and for which the same water two years ago was free.

For the foregoing reasons, the CBIA respectfully submits this amicus curiae brief.

BEST BEST & KRIEGER LLP

By: /s/ Jeffrey V. Dunn
JEFFREY V. DUNN
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Attorneys for Amicus Curiae
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CERTIFICATE OF SERVICE

I, Eugenia Duran, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. My email address is: eugenia.duran@bbklaw.com. On June 16, 2023, I served the document(s) described as **AMICUS CURIAE BRIEF TO REPLY TO REAL PARTY IN INTEREST'S RETURN ON WRIT** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on September 1, 2022, from the court authorized e-filing service at TrueFiling. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

☒ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 16, 2023, at San Jacinto, California.

/s/ Eugenia Duran
Eugenia Duran

SERVICE LIST

Mojave Pistachios, LLC, et al., v. Indian Wells Valley Water District, et al.
Court of Appeal, Fourth Appellate District, Division 3, Case No. G062327
Superior Court Case No. 30-2021-01187589-CU-WM-CXC
[Consolidated Case No. 30-2021-01188089-CU-WM-CXC; Related Case No. 30-2021-01187275-CU-OR-CJC; Related Case No. 30-2022-01239487-CU-MC-CJC; Related Case No. 30-2022-01239479-CU-MC-CJC; Related Case No. 30-2022-01249146-CU-MC-CJC]

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BY U.S. MAIL: Judge William Claster, Dept. CX104 Orange County Superior Court Civil Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701 Telephone: (657) 622-5303	**California Supreme Court [Electronic Service under Rule 8.212(c)(2)]**

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June 16, 2023

The Honorable Eileen C. Moore, Acting Presiding Justice
The Honorable Thomas M. Goethals, Associate Justice
The Honorable Maurice Sanchez, Associate Justice
California Court of Appeal, Fourth Appellate District, Division Three
601 West Santa Ana Blvd.
Santa Ana, California 92701

Re: *Mojave Pistachios, LLC v. The Superior Court of Orange County* (Case No. G060336) – Amicus Letter in Support of Petition Filed by Petitioners Mojave Pistachios, LLC, et al.

Dear Justices Moore, Goethals, and Sanchez:

A group of landowners in Madera County who are parties to a similar lawsuit arising under the Sustainable Groundwater Management Act ("SGMA"), filed in the Superior Court of Madera County, respectfully request this Court's consideration of the following letter-brief in support of Petitioners in the above-referenced appellate proceeding.

I. Introduction

Several landowners in Madera County are plaintiffs and petitioners ("Madera Landowners") in a case filed against the Madera County Groundwater Sustainability Agency ("Madera GSA") in the Superior Court of Madera County.[1] All of the Madera Landowners own property in Madera County. Collectively, they own more than 31,000 acres, all of which overlies the Madera Subbasin. Their lands are irrigable and well suited to growing crops that are commonly grown in the Madera County area, including almonds, pistachios, grapes, and alfalfa. As owners of land overlying a

[1] *Cardoza, et al. v. Madera County Groundwater Sustainability Agency* (Madera County Superior Court, Case No. MCV86218). There are three other related cases, also filed in Madera County, that raise similar challenges to the Madera GSA's implementation of its groundwater sustainability plan (Case Nos. MCV086277, MCV087598, and MCV087677).

groundwater basin, they hold common law overlying water rights to put the groundwater in the Madera Subbasin to reasonable and beneficial use.

The Madera Subbasin has been identified by the California Department of Water Resources ("DWR") as a high-priority, critically overdrafted basin. Seven groundwater sustainability agencies ("GSAs") were formed to manage the Madera Subbasin, one of which is the Madera GSA. All of the Madera Landowners' properties are within the Madera GSA's jurisdictional boundaries. The Madera GSA jointly prepared a groundwater sustainability plan ("GSP") with three other GSAs. DWR has not yet approved their joint GSP, but the Madera GSA has begun implementing it.

In their lawsuit, the Madera Landowners are challenging the Madera GSA's implementation of the GSP on the grounds that the GSA ignored common law water rights principles and adopted an unlawful allocation of the Madera Subbasin's sustainable yield of groundwater. The Madera Landowners' allegations against the Madera GSA are similar to those of Petitioner Mojave Pistachio, LLC ("Petitioner") in the above-referenced appellate writ proceeding. Likewise, the arguments that Real Party in Interest Indian Wells Groundwater Authority ("Authority") asserts in its Answer to Petition for Writ of Mandate ("Answer") echo arguments that the Madera GSA has made in its demurrers to the Madera Landowners' Complaint and its First Amended Complaint.[2]

As indicated in the other three amicus briefs submitted in support of Petitioners, the instant proceeding is of great importance to California farmers, ranchers, and other landowners, including the Madera Landowners, whose longstanding rights to the use of groundwater are being threatened by unlawful actions taken by local agencies under the guise of SGMA. The lawful implementation of SGMA in a manner that preserves such common law water rights – as SGMA itself requires – is a burgeoning issue of statewide importance.

II. The Petition Raises Issues Justifying the Relief Sought

A. There is a critical need for appellate guidance on the proper interpretation of SGMA

SGMA is of critical importance to the livelihoods of farmers and other groundwater users throughout the state. SGMA was passed only in 2014, and California appellate courts have not had an opportunity to interpret the issues presented here, including conflicts between common law water rights, on the one hand, and the implementation of GSPs by local GSAs pursuant to SGMA, on the other hand. As similar issues are being raised in other courts across the state, there is a critical need for appellate guidance.

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[2] The Madera Landowners prevailed on demurrer with respect to the issues described herein, and the case is now at issue.

In the present case, the Authority asserts that SGMA purports to allow GSAs sweeping authority to ignore long-standing common law rules concerning overlying water rights. The Madera GSA has asserted similar outrageous distortions.

For example, in its demurrers to the Madera Landowners' complaint, the Madera GSA has asserted that it can establish groundwater allocation rules without regard for existing water rights and priorities:

- "SGMA agencies do not make water rights determinations, nor do their actions determine water rights." (*See* Petitioners' Request for Judicial Notice ("RJN") filed on April 3, 2023, Exh. E, at p. 7:11-12; *see also id.* at pp. 13:15-21, 15:9-12.)

- Stating that in order to fulfill the requirements of SGMA, GSAs have "authority to establish 'groundwater extraction allocations.' Extraction allocations are not, however, 'a final determination of rights to extract groundwater from the basin or any portion of the basin.' In fact, no act of a GSA 'determines, or alters, surface water rights or groundwater rights….'" (*Id.* at p. 9:2-7 [citations omitted].)

- "[A]s a matter of law, the Allocation Approach is not a determination of Plaintiffs' common law water rights." (*Id.* at p. 19:25-28, citing Wat. Code, § 10726.4(a).)

The cynicism of the Madera GSA's position cannot be overstated. As noted below, SGMA provides that nothing in a GSP, or rules adopted to implement a GSP, alters or determines a party's water rights. In essence, the Madera GSA's position is that these statutes should be construed so narrowly so as to mean only that a GSA cannot adopt a GSP that *directly and explicitly limits* the nature and scope of a party's water rights. However, a GSA purportedly remains free to adopt whatever rules it desires that have *the inevitable effect* of limiting a party's water rights. That is not the law and is not what the Legislature intended. (*See, e.g.*, Wat. Code, § 10720.1(b) ["It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater"]; *Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 854 [noting, in affirming the judgment, that the trial court determined that the Legislature "'went out of its way to state that SGMA supplements and does not alter the common law'"].)

In addition, the Madera GSA has improperly claimed to have the authority to unilaterally deprioritize the water rights of certain rights holders in favor of others – a power that is limited to courts presiding over a comprehensive basin-wide adjudication under Code of Civil Procedure Section 830 *et seq.* (*See Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992).[3] The following excerpts exemplify this unlawful power grab:

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[3] The State Water Resources Control Board ("State Water Board") also has similar authority, but only with respect to surface water rights. (Wat. Code, § 2500 *et seq*.)

- "The Non-Users position ignores that non-used overlying water rights can, and in this case should, be deprioritized." (RJN, Exh. E at p. 12:24-25.)

- "This cause of action relies upon a prior superseded principle that overlying water rights cannot lose their pumping priority due to non-use. This is not the law." (*Id.* at p. 14:8-10; *see also id.*, Exh. G at p. 6:5-16, citing *Antelope Valley* at p. 1032, and *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339; *see also* RJN, Exh. G at p. 6:1-24.)

- "To the extent that the Allocation Approach deprioritizes the Non-Users overlying rights—by requiring that they opt-in for a SYA [sustainable yield allocation] by demonstrating the water will be put to reasonable and beneficial use—this is not a violation of their water rights." (RJN, Exh. G at p. 6:5-16, citing *Antelope Valley* at p. 1032, and *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339.)

The Madera GSA has also wrongly argued that SGMA eliminates the longstanding right of complainants like the Madera Landowners and Petitioners to seek injunctive, declaratory, and mandamus relief to protect their rights and, instead, restricts such water rights holders to the procedural vehicle of a comprehensive adjudication under Code of Civil Procedure Section 830 *et seq.* as the exclusive remedy:

- "If Plaintiffs want to adjudicate their water rights *vis a vie* other users, the remedy is a basin adjudication involving all parties." (RJN, Exh. E at p. 7:12-14.)

- "If an extractor wants a determination of their groundwater rights in a basin, they may file 'an adjudication action pursuant to Chapter 7 (commencing with Section 830) of Title 10 of Part 2 of the Code of Civil Procedure." (*Id.* at p. 9:7-9.)

On this point too, the Madera GSA is wrong. (Code Civ. Proc., § 833(b)(3) [statutory scheme governing basinwide water rights adjudications expressly excludes any "action that can be resolved among a limited number of parties and does not involve a comprehensive determination of rights to extract groundwater within the basin"].)

In sum, the instant appellate proceeding is not the only pending matter involving an overzealous GSA's encroachment on the vested, common law water rights of those like the Madera Landowners and Petitioners – and it will not be the last. Appellate guidance on this topic would be very beneficial.

B. The Legislature was clear that a GSA cannot take action that changes water rights and priorities.

GSAs may not act with impunity, and their authority is subject to important constraints. In particular, SGMA prohibits GSAs from altering, changing, or making a "binding determination of water rights." (Wat. Code, § 10726.8(b); *see also id.*, § 10720.5(b) ["Nothing in this part, *or in any groundwater management plan* adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law…." (emphasis added)].) SGMA also prohibits a GSA from acting in a manner that is inconsistent with the constitutional doctrine of reasonable and beneficial use. Management of any basin subject to SGMA must be "consistent with" the provisions in Article X, Section 2 of the California Constitution. (*Id.*, § 10720.5(a) ["[n]othing in this part modifies rights or priorities to use or store groundwater consistent with…" that Constitutional provision].)

SGMA is consistent with pre-existing law in this respect. (*See City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249 ["no appellate court has endorsed an equitable apportionment solution that disregards overlying owners' existing rights"]; *Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 78 [in a private dispute between a limited number of parties, the court stated "we are asked to decide whether a trial court, in a judicial determination of a ground water dispute among private parties and public entities, may define or otherwise limit future ground water rights of an overlying owner who has not yet exercised those rights. We hold that it may not and reverse judgment" (emphasis added)].)

Like the Madera GSA, the Authority has also erroneously suggested that a comprehensive adjudication of all groundwater rights under the Code of Civil Procedure is the only remedy available to complainants like Petitioners seeking to protect their overlying rights. However, nothing in SGMA restricts complainants to those procedures. Basin-wide adjudication procedures are permissive, but by no means the exclusive avenue for relief. (See Wat. Code § 10720.5(c) ["Water rights *may* be determined in an adjudication action pursuant to Chapter 7 commencing with Section 830) of Title 10 of Part 2 of the Code of Civil Procedure" (emphasis added)].) Water rights holders continue to have the right to pursue private litigation against public agencies to protect their water rights. (*See, e.g., Wright* at pp. 88-89; *Antelope Valley* at pp. 1034-1035 [distinguishing *Wright* and *Barstow* without changing the general rule in those decisions that landowners may pursue private adjudications].) SGMA and the common law of water rights govern such disputes; the principles of comprehensive basin-wide adjudications do not.

C. SGMA does not allow GSAs to act as if a groundwater adjudication has already occurred or assume that kind of authority

Separate and apart from SGMA, the Legislature enacted a procedure that empowers *courts* to oversee basin-wide adjudications and make determinations of all groundwater rights in the basin, "whether based on appropriation, overlying right, or other basis of right…," as well as make

declarations of priorities between water rights holders. (Code Civ. Proc., § 834.) With the exception of certain provisions intended to prevent undue interference with a GSA's compliance with SGMA, nothing in SGMA purports to supersede courts' jurisdiction over such matters. (*See* Wat. Code, §§ 10737.2, 10737.2, 10732.8.) Nothing in SGMA suggests that GSAs have such authority. To suggest otherwise is an egregious overreach of agency power.

Yet the Authority and the Madera GSA claim to have the same power to deprioritize the water rights of certain users that courts have in basinwide adjudications. (Code Civ. Proc., § 830(b)(7) ["The court may consider applying the principles established in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339"].) But there is no authority to support the existence of any such agency power. A GSA is not a court, and only courts have authority, in accordance with certain requisite procedures and conditions, to change the priorities of overlying water rights in relation to others.

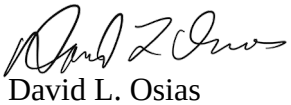
Further, there are vital due process considerations integral to the basinwide adjudication process that are completely absent when a GSA allocates groundwater. (*See, e.g.*, Code Civ. Proc., § 835 [requiring notice of the adjudication to a broad range of potentially interested parties, including all parties who are reporting groundwater extractions to a GSA, the State Water Board, or another local agency]; *id.*, § 850 [a court's judgment must meet certain requirements concerning the rights and priorities with regard to any stipulating and non-stipulating parties]; *Antelope Valley* at p. 1058 [due process in a basin-wide adjudication includes "a *judicial determination* as to the Basin's safe yield, the quantity of surplus water available, if any, the correlative overlying rights of each cross-defendant to the safe yield and an inter se determination of the rights of persons and/or entities with overlying, appropriative, and prescriptive rights to pump water from the basin" (emphasis added)].)

The question of whether GSAs can *de facto* adjudicate groundwater rights, as the Authority has attempted to do, resulting in the subversion of correlative overlying water rights, is not exclusive to this case. It is a current issue before the Madera Superior Court, and it is likely to be raised in other courts as landowners continue to challenge the implementation of GSPs across the state.

III. Conclusion

We urge the Court to consider the importance of the fair and lawful implementation of SGMA and the impact its decision will have on other courts currently considering SGMA cases, in addition to the effect on California landowners. We believe the trial court's order in this case is contrary to SGMA and the well-established common law of overlying water rights. We respectfully ask the Court to grant the petition for writ of mandate and reverse the trial court's order.

Very truly yours,



David L. Osias

CERTIFICATE OF SERVICE

I, Tess Palas, declare:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is Three Embarcadero Center, 12th Floor, San Francisco, California 94111-4074.

On June 16, 2023, I served the within document(s) described as:

MADERA LANDOWNERS' LETTER BRIEF - AMICUS LETTER IN SUPPORT OF PETITION FILED BY PETITIONERS MOJAVE PISTACHIOS, LLC, ET AL.

on the interested parties in this action as stated below:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I placed a true copy of the document in a sealed envelope or package addressed as indicated above on the above-mentioned date in San Francisco, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on and in accordance with a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused a true copy of the document to be sent to the persons at the corresponding electronic address as indicated above on the above-mentioned date. My electronic notification address is tpalas@allenmatkins.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 16, 2023, at San Francisco, California.

Tess A. Palas
(Type or print name)

T Palas
(Signature of Declarant)

SERVICE LIST

Mojave Pistachios, LLC, et al., v. Indian Wells Valley Water District, et al.
Court of Appeal, Fourth Appellate District, Division 3, Case No. G062327
Superior Court Case No. 30-2021-01187589-CU-WM-CXC
[Consolidated Case No. 30-2021-01188089-CU-WM-CXC; Related Case No. 30-2021-01187275-CU-OR-CJC; Related Case No. 30-2022-01239487-CU-MC-CJC; Related Case No. 30-2022-01239479-CU-MC-CJC; Related Case No. 30-2022-01249146-CU-MC-CJC]

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No. G062327

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION 3

MOJAVE PISTACHIOS, LLC, a California limited liability company, and PAUL G. NUGENT AND MARY E. NUGENT, Trustees of the Nugent Family Trust dated June 20, 2011

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a California joint powers authority; THE BOARD OF DIRECTORS OF THE INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a governing body,

Real Parties in Interest.

Appeal from the Superior Court of the
State of California for the County of Orange
The Honorable William D. Claster | Case No. 30-2021-01187589

AMICUS CURIAE BRIEF TO REPLY TO REAL PARTY IN INTEREST'S RETURN ON WRIT

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SEARLES VALLEY MINERALS INC.'S AMICUS CURIAE BRIEF IN REPLY TO REAL PARTY'S RETURN

Searles Valley Minerals Inc. ("Searles") respectfully submits this amicus brief to address Authority's misapplication of the "pay first, litigate later" doctrine and to provide further clarity as to applicable constitutional and statutory law on water rights and water public policy.

INTRODUCTION AND PROCEDURAL POSTURE

A detailed description of Searles' operations and water rights, as well as the procedural posture of this case, was provided in Searles' amicus curiae letter brief to this Court dated April 7, 2023. Searles does not repeat matters already presented therein for efficiency and to minimize duplication.

The Petition for Writ of Mandate or Other Appropriate Relief ("Petition") filed by Petitioners Mojave Pistachios, LLC and Paul G. Nugent and Mary E. Nugent, Trustees of the Nugent Family Trust dated June 20, 2011 (collectively, "Mojave Pistachios") seeks review of the trial court's order sustaining a demurrer to Mojave Pistachios' causes of action challenging Authority's Implementing Actions[1] that were enacted as part of Authority's Groundwater Sustainability Plan ("Plan") for the Indian Wells Valley Groundwater Basin ("Basin").

"In considering whether a demurrer should have been sustained, '[the court accepts] as true all-well pleaded facts in the operative complaint. . . .'" (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 786 [quoting *Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, n.1].) Similar to the Searles complaint, Mojave Pistachios' operative complaint contains extensive factual allegations concerning the illegal nature of the Plan, and Authority conduct implementing the Plan, which are accepted as true on

[1] The Implementing Actions include, *inter alia*, Annual Pumping Allocations, a Replenishment Fee, and other actions implementing the Plan.

review of the lower's court's ruling on demurrer. (PA 6 Tab 59, pp. 2951-3008.)

ARGUMENT

Authority primarily argues that "pay first, litigate later" as a constitutional law bars Mojave Pistachios' allegations challenging the Plan and Authority's allocations of groundwater (or lack thereof) to Mojave Pistachios and other groundwater users, including Searles and Searles' longstanding priority groundwater rights. As explained herein, Authority does not recognize that (a) "pay first" does not apply here as a constitutional law, and (b) that the public policy considerations underlying "pay first" also do not apply here.

"Pay first" as a public policy does not supersede constitutional and statutory law, including a constitutional mandate that groundwater resources be put to beneficial use to the fullest extent of which they are capable under Article X, Section 2 of the California Constitution. Moreover, well-established law allows Searles and other groundwater users to exercise their respective groundwater rights without having to pay a groundwater replenishment fee such as the Replenishment Fee here. Finally, Authority's own subsequent lawsuits in the lower court that seek to enjoin Mojave Pistachios and Searles from exercising groundwater rights for failure to pay the Replenishment Fee allow for Mojave Pistachios and Searles to challenge the Replenishment Fee without payment.

In short, the "pay first" doctrine does not permit Authority to shut off Mojave Pistachios' (or Searles') reasonable and beneficial use of water simply for non-payment of Authority's Replenishment Fee. A shut-off will cause severe and irreparable harm to Searles and to the economically disadvantaged communities of Trona, Argus, Pioneer Point and Westend

(collectively, "Trona Communities") who depend upon Searles' continued groundwater production for their drinking water supply.[2]

1. "Pay First, Litigate Later" As A Constitutional Doctrine Applies Only to State Agencies and Not to The Authority

Article XIII, Section 32 of the California Constitution provides: "No legal or equitable process shall issue in any proceeding in any court *against this State or any officer thereof* to prevent or enjoin the collection of any tax." (Emphasis added.) The constitutional "pay first, litigate later" rule applies only to the California state government and to California state officials under the Constitution's plain language. (*City of Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825, 830.) Indeed, this court has recognized that the "pay first" constitutional rule applies only to the state. (*Bunker v. County of Orange* (2002) 103 Cal.App.4th 542, 555 ["The constitutional provision has been held to apply *only* to actions against the state" [citing *Pacific Gas and Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 281, n. 6].)

Authority is not a branch of the state government. It is a local agency. (See Wat. Code, § 10721(j), (n).) "Pay first" therefore does not apply to the Authority as a constitutional mandate, but rather, would apply only if public policy considerations support its application without any applicable exceptions. Here, applicable law and public policy

[2] Authority argues that by providing an Annual Pumping Allocation "that covers the entire domestic water service to the community of Trona," there is no threat to the Trona Communities. (Return at 66, n. 10.) That is incorrect, and is not what is pled in Searles' operative complaint. Searles pleads facts establishing its prior and paramount groundwater rights and also pleads facts that if Searles' operations cannot use groundwater, then the Trona communities lose their sole supply of water. Stated simply, Searles' operations depend upon continued groundwater use, and the Trona communities are dependent upon that groundwater use for their water supply.

considerations do not allow for the application of the doctrine to the facts alleged in the consolidated cases.

2. Courts Recognize A "Pay First, Litigate Later" Public Policy Application For Local Agencies

The development of "pay first" as public policy for local agencies is explained in several California appellate decisions. (See *Pacific Gas and Electric Co.*, *supra*, 27 Cal.3d 277; *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 492-493; *Flying Dutchman Park, Inc. v. City and County San Francisco* (2001) 93 Cal.App.4th 1129, 1138; *Writers Guild of America, West v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 483 ["Yet, we see no reason why we should follow the public policy set forth in *Pacific Gas & Electric* evoking the language of the United States Supreme Court's 1871 decision of *Dows v. City of Chicago*. . . ." [citation omitted]].)

For example, separate divisions of the Second District of the Court of Appeal have different holdings on this point. In *City of Anaheim, supra*, 179 Cal.App.4th 825, 828, the Second District, Division 2 held that the principle applies only to state agencies: "City cannot invoke article XIII, section 32 in this case because that constitutional provision applies only to actions against the state or an officer of the state." In *Water Replenishment Dist. of Southern California v. Cerritos* (2013) 220 Cal.App.4th 1450, 1468, the Second District, Division 1 of the Court of Appeal extended the doctrine on public policy grounds: "[A]s a matter of public policy the 'pay first, litigate later' doctrine of section 32 of article XIII of the California Constitution applies here." Application of the "pay first" public policy, however, can only extend so far. For example, the California Supreme Court has limited its public policy application as it "does not justify precluding legitimate class proceedings for the refund of allegedly illegal taxes…." (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 252.)

Authority asserts that application of "pay first" is "the black-letter holding of the California Supreme Court, more than a dozen Court of Appeal decisions spanning several decades, and three separate rulings by two different judges in the trial court of this case." (Return at 13.) This blanket statement omits analysis of the case law on the doctrine and its limitations.

Here, Searles does not seek to overturn the "pay first" doctrine, but rather, to establish that: the constitutional provision does not apply to Mojave Pistachios or Searles under present circumstances; the "pay first" public policy does not apply to the facts alleged in the consolidated cases; and that the comprehensive adjudication of groundwater rights in the lower court will first decide the parties' water rights, which will in turn necessarily determine what amount, if any, a party must pay in replenishment fees.

3. <u>"Pay First, Litigate Later" Public Policy Is Not Absolute, and Certain Exceptions to its Application Apply Here to Prevent Extraordinary Harm</u>

Generally, in *Howard Jarvis Taxpayer Association v. City of La Habra* (2001) 25 Cal.4th 809, 824, the California Supreme Court made clear that the "public policy favoring security of municipal finance . . . 'is not a trump card that somehow requires the courts to countenance *ultra vires* or illegal tax practices.'" More recently, in *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620, 642, the court recognized that "the County's recurrent invocation of public policy and the threat to its financial resources 'is not a trump card' requiring courts to accept or ignore *ultra vires* or illegal practices."

As the Supreme Court explained in *Dows v. City of Chicago* (1870) 78 U.S. 108, 109-110, there are certain exceptions specific to the "pay first" public policy: "There must be some special circumstances attending a

threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. . . . It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court equity can be invoked."

The extraordinary exceptions in *Dows* apply to the "pay first" public policy for local agencies: "Not surprisingly, the law of tax remedies began with actual taxpayers trying to get refunds. Given the importance of a steady and predictable stream of income to states and local governments, courts declined to act until the challenged tax had actually been paid." (*Chiatello, supra,* 189 Cal.App.4th at 492.) This was the genesis of the "pay first, litigate later" principle found in Article XIII, Section 32. Again, going back to Justice Field, a tax would be enjoined only in very rare instances where more than a naked claim of illegality was raised: "A suit in equity will not lie to enjoin the collection of a tax on the sole ground that it was illegal. There must exist in addition, special circumstances bringing the case under some recognized head of equity jurisdiction such as the enforcement of the tax would lead to a multiplicity of lawsuits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant." (*Dows, supra,* 78 U.S. at 109.) This reasoning was also adopted by the California Supreme Court and by this court: "But if there was an adequate remedy at law – which almost always meant a refund procedure – the collection of the tax would not be halted by the courts." (*Chiatello, supra,* 189 Cal.App.4th at 493.)

In *Flying Dutchman, supra,* 93 Cal.App.4th 1129, 1141, the court recognized that the *Dows* exceptions to the "pay first" policy applied to challenges to local taxes: "It has long been established that suits to enjoin

the collection of taxes may not be maintained even though the imposition of the tax may be 'illegal and void' unless grounds are presented 'justifying the interposition of a court of equity to enjoin its collection.'" Equity jurisdiction, as the Supreme Court explained in *Dows*, "will lie to restrain collection of taxes only where the taxpayer 'has no adequate remedy by the ordinary processes of the law,' and it must appear that the enforcement of the tax would . . . produce irreparable injury. . . .'" (*Flying Dutchman*, *supra*, 93 Cal.App.4th 1129, 1141 [quoting *Dows*, *supra*, 78 U.S. at p. 110].)

Factual allegations by Mojave Pistachios establish irreparable harm to real property in that tens of thousands of its pistachio trees will die unless the Replenishment Fee is enjoined pending the lower court's determination of the parties' groundwater rights and provision of a physical solution for the Basin's groundwater supply. For Searles, there is extraordinary irreparable harm not only not to Searles' business operations, which provide crucial national health and security infrastructure services, but also to the Trona Communities and their drinking water supply, which comes from Searles' groundwater wells.

Additionally, "[t]he right to water to be used for irrigation purposes is a right in real property." (*Chrisma v. Southern California Edison Co.* (1927) 83 Cal.App. 249, 258.) It is beyond reasonable dispute that Mojave Pistachios pleads a claim of right to irrigate its property and an irreparable injury to real property.

At its core, Searles' groundwater rights are "the life blood of its existence." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702.)

Under these facts as alleged, there is no ordinary adequate remedy at law because even if the Replenishment Fee were paid, it would be expended by the Authority and there would remain no ability to secure a

refund of the fees paid. The irreparable harm is extraordinary to so many, and is so great, that it cannot possibly be compensated by a refund procedure or even damages paid the Authority.

4. <u>"Pay First, Litigate Later" Public Policy Does Not Apply To The Facts Alleged Here</u>

The well-recognized public policy purpose of "pay first" is to "allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted." (*City of Anaheim, supra*, 179 Cal.App.4th 825, 827 [citations and quotations omitted].)

Authority argues that the Replenishment Fee is necessary to fund future imported water projects. But these imported water projects do not presently exist (and will not for many years, if ever), and therefore they do not presently supply water to the Basin. (Return at 27 [explaining the "Replenishment Fee is designed to raise the revenue needed within 5 years" and that Authority is only "in negotiations for the purchase of the rights to supplemental water"].) The Replenishment Fee funds no "essential public services dependent on the funds" that are being "unnecessarily interrupted" by Searles' or Mojave Pistachios' objections to payment of the Replenishment Fee, because the water delivery services do not yet exist. Because they do not exist, they cannot be immediately essential, nor can they be immediately interrupted. Therefore, the "pay first" public policy considerations do not apply to the Replenishment Fee here.

Authority's reliance on *Cerritos* is further misplaced for at least four main reasons. (See, e.g., Return at 41.)

First, *Cerritos* was decided after an adjudication of all basin groundwater rights, including the rights of the party challenging the fee. (*Cerritos*, 220 Cal.App.4th at 1454-1455.) Applying a fee to adjudicated rights is materially different from the instant case. Here, a comprehensive

groundwater rights adjudication is pending, and water rights have not yet been determined. Further, even though both Mojave Pistachios and Searles were given no allocation of groundwater by Authority, Authority is well-aware that Searles has legitimate priority rights claims. (See Exhibit "1" [Declaration of Jeffrey V. Dunn] ("Dunn Decl."), Exhibit "A" at pp. 4-5 [June 3, 2020 letter from E. Garner of Best Best & Krieger, LLP to C. Altare of Department of Water Resources].) Because Searles' water rights have not yet been determined, Authority cannot rely on *Cerritos*.

Second, the fee at issue in *Cerritos* funded the existing importation of water, and non-payment of the fee immediately threatened "the current quantity of groundwater in the basins." (*Cerritos*, 220 Cal.App.4th at 1459.) As explained above, the opposite is alleged here. The Replenishment Fee does not support the active importation of water, but instead applies to speculative and future imported water supply. (Return at 27.) Non-payment of the Replenishment Fee cannot and does not immediately threaten the existing provision of water.

Third, the fee in *Cerritos* was governed by a refund procedure available to the fee challenging party. (*Cerritos*, 220 Cal.App.4th at 1468.) There was no such refund procedure in *City of Anaheim*. (*Id.*) Nor is there a refund process here, and accordingly, "pay first" likewise does not apply. Ordinance 03-20, which established the Replenishment Fee on August 21, 2020, contains no language creating or providing for any procedure to challenge the Replenishment Fee. (PA 2 Tab 15, pp. 1151-53.) With no procedure for challenging the Replenishment Fee, Mojave Pistachios and Searles have proceeded appropriately to seek recourse in the courts.

Finally, the harm threatened here to Searles is severe and irreparable: inability to produce materials critical to vaccine vial manufacturing, inability to employ those in the Trona Communities, and a complete loss of the Trona Communities themselves. These considerations would be before

the lower court on Authority's preliminary injunction cases, and are relevant here to guide this Court's decision on what makes for the correct public policy outcome when deciding whether to apply "pay first." Authority's reliance on *Cerritos* fails to raise this key consideration.

5. <u>"Pay First" Public Policy Cannot Supersede State Constitutional and Statutory Law, Including Article X, Section 2 of the California Constitution Which Applies Here and Prevents Use of "Pay First" On Public Policy Grounds</u>

"Pay first" also cannot be applied here as a matter of public policy because Article X, Section 2 of the California Constitution mandates "that the water resources of the State be put to beneficial use to the fullest extent of which they are capable," and that "the reasonable and beneficial use" of water be "in the interest of the people and for the public welfare." This mandate is reiterated throughout the Water Code. (See, e.g., Wat. Code, § 100 [requiring "the reasonable and beneficial use" of water resources "in the interest of the people and for the public welfare."].)

Groundwater management pursuant to the Sustainable Groundwater Management Act ("SGMA") "shall be consistent with Section 2 of Article X of the California Constitution." (Wat. Code, § 10720.5.) Indeed, a primary purpose of SGMA is "[t]o enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution. It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater." (Wat. Code, § 10720.1(b).)

Maximum reasonable and beneficial use of water is a constitutional mandate. (*Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 259 [describing it as "the constitutional mandate to prevent waste and

unreasonable water use and to maximize the beneficial use of this state's limited resource"]; see also *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 141 ["We cannot deem such a use to be in accord with the constitutional mandate that our limited water resources be put only to those beneficial uses 'to the fullest extent of which they are capable,' that 'waste or unreasonable use' be prevented, and that conservation be exercised 'in the interest of the people and for the public welfare.'" [quoting Cal. Const. Art. X, Sec. 2]]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 ["This amendment does more than merely overturn *Herminghaus*—it establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use."].)

Public policy that favors maximizing the reasonable and beneficial use of water prevents the public policy application of "pay first" here.

Searles serves drinking water to the disadvantaged Trona Communities. Domestic use of water is the highest priority use in California. (Wat. Code, § 106 ["use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation"]; see also Wat. Code, § 1254 ["domestic use is the highest use and irrigation is the next highest use of water"].)

Water for domestic use is a basic human right, as "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." (Wat. Code, § 106.3(a); see also *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278 [applying Water Code sections 106 and 106.5 for domestic and municipal uses as the highest, protected uses].) Searles' service of domestic water to the Trona Communities is reasonable and beneficial and is the "highest use" of water under California law. (Wat. Code, § 106.) Authority's threat to enjoin Searles' pumping would violate the

constitutional mandate to use water resources reasonably and beneficially to the fullest extent possible. Article X, Section 2, and the public policy in favor of drinking water supply, overrides application of "pay first" public policy under the alleged facts.[3]

Principles of constitutional interpretation also prevent applying "pay first" as a public policy here. Constitutional interpretation includes "examin[ing] the text of that constitutional provision, applying the same general principles as those on which statutory construction is based." (*Persky v. Bushey* (2018) 21 Cal.App.5th 810, 818.) "[L]anguage itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context." (*Coastline JX Holdings LLC v. Bennett* (2022) 80 Cal.App.5th 985, 1004.) Where a constitutional provision's "plain language . . . is clear and unambiguous," it would be inappropriate for the Court "to override the clear words of the statute to find" a public policy exemption. (*Bitner v. Dep't of Corrections & Rehab.* (2023) 87 Cal.App.5th 1048, 1064.)

In *Bitner*, the Court of Appeal, Fourth District, Division 2 declined to apply a public policy exemption to the plain language of a statute that did not expressly consider or reference such an exemption:

> As we have already explained, the plain language of section 844.6 is clear and unambiguous. The words of the statute make no suggestion that claims brought under FEHA should be considered exempt from its otherwise broad grant of immunity. Nor have plaintiffs' arguments presented a

[3] Further, were the two constitutional provisions actually in conflict (and they are not, because "pay first" does not apply here as a constitutional mandate), "[i]t is incumbent upon courts to harmonize statutes based on their texts." (*People v. Superior Court of Riverside County* (2022) 81 Cal.App.5th 851, 863 [citations and quotations omitted].) This Court could harmonize the language of each "pay first" and Article X, Section 2 by looking at the plain language of the doctrine and electing to apply it only to state governments, and not to local governments.

> reasonable alternative interpretation of the otherwise clear language of section 844.6. Even if we agreed that exempting FEHA claims from section 844.6's grant of immunity is preferable as a matter of public policy, **it would be inappropriate for us to override the clear words of the statute to find such an exemption**. Whether the claims brought under FEHA should be exempt from the immunity granted in section 844.6 as a matter of public policy is a question that should be resolved by the Legislature, and we decline to make such a determination under the guise of statutory interpretation.

(*Bitner*, 87 Cal.App.5th at 1064 [emphasis added].) *Bitner*'s reasoning applies here. The constitutional mandate that water must be put to reasonable and beneficial use to the fullest extent of which it is capable is clear. There is no exemption in the constitution's language stating that water should stop being used if public policy considerations are present that dictate otherwise. Authority is in essence seeking a public policy exemption by arguing that the doctrine overrides the Article X, Section 2 constitutional mandate and allows Authority to shut off water based on non-payment of the Replenishment Fee. Authority's threat to shut off Searles' water based on non-payment of the Replenishment Fee violates Article X, Section 2's plain language.

Authority's reliance on a public policy argument to apply "pay first" here is unconvincing. "[I]t is generally agreed that 'public policy' as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095.) The application of public policy here is both less precise than, and superseded by, the plain language of the constitutional mandate of Article X, Section 2. The legislature has spoken directly on the importance of maximizing the reasonable and beneficial use

of water and of the priority of use for domestic purposes. The legislature has not spoken directly on whether non-payment of a replenishment fee, which fee presently provides no water for domestic purposes, can support the shut-off of domestic water actually being used.

6. The Authority Improperly Determined Water Rights To Force Payment Of The Replenishment Fee

Authority cannot determine water rights. (See, e.g., Petition at 10; Return at 21-22.) Nevertheless, Authority's enactment of the Plan via the Implementing Actions, including the Annual Pumping Allocations and Replenishment Fee, improperly determined water rights.

Under SGMA, the legislature prohibited groundwater sustainability agencies, including Authority, from making determinations with respect to vested water rights. (Wat. Code, §§ 10720.1(b), 10720.5, 10726.8(b), 10738.) Only the courts have the power to determine water rights. (Wat. Code, § 10720.5(c), Code Civ. Proc., § 830, *et seq.*)

Authority repeatedly asserts that it did not determine water rights here. (Return at 14-15, 18.) Authority also repeatedly asserts that the federal government has a priority groundwater right. (Return at 15 [arguing the Authority's Plan considered the Navy's "federally reserved water rights".]; see also PA 9 Tab 79, p. 4059-60.) Authority spends several paragraphs detailing the amount of the Navy's federally reserved water rights (which are "not limited to 2,041 acre-feet per year"), and describes how the Authority accommodated such rights in its Plan. (See, e.g., Return at 25-26.) In addition, "Authority denies that Mojave [Pistachios] has vested overlying water rights." (Return at 19.)

Authority's position is internally inconsistent. Authority simultaneously argues that it did not determine water rights, but also declares its determination that the Navy has priority groundwater rights, and further declares the non-existence of Mojave Pistachios' groundwater

rights. (Return at 19, 26.) Authority relied upon its improper determination of these water rights to enact the Replenishment Fee and determine the Annual Pumping Allocations, rendering the Implementing Actions *ultra vires* exercises of powers determining water rights.

As stated above, Searles has pled facts showing it has prior and paramount groundwater rights. Searles has further pled that it provides domestic drinking water to the Trona Communities. For these reasons, Searles cannot be forced to pay a fee of such unprecedented magnitude. (*City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 341 ["The city is a prior appropriator, and as such cannot be compelled to incur any material expense in order to accommodate the subsequent appropriator."]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 574 [noting that while a court has power to require repairs or other work, it must keep "in mind the fact that respondents have prior rights and cannot be required lawfully to incur any material expense in order to accommodate appellant"]; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 376.) The Replenishment Fee is based on Authority's findings that the Navy has superior groundwater rights, and that Mojave Pistachios and Searles have no or lower priority groundwater rights, even though Authority is well-aware that Searles likely has the prior and paramount groundwater rights. (See Dunn Decl., Exhibit "A" at pp. 4-5.)

SGMA does not authorize Authority to determine, let alone take, a party's groundwater rights under the guise of a fee. Authority has effectively made an impermissible determination of groundwater rights through its Implementing Actions and now seeks to prevent Searles from exercising its prior and paramount groundwater rights.

7. Searles Has Standing to Continue Challenging the Replenishment Fee

Searles and Mojave Pistachios are not alone in challenging the Implementing Actions. The Indian Wells Valley Water District ("District") is also challenging the Replenishment Fee. The District is presently paying the Replenishment Fee under protest. (See Dunn Decl., Exhibit "B" at p. 1 [May 22, 2023 letter from District to Authority stating: "As with all past payments, any fees paid or deemed paid by the District towards the Replenishment Fee are paid under protest pursuant to California Water Code section 10726.6, subdivision (d). District further requests that if the Replenishment Fee is found to be invalid, that any payments may be refunded to the District."].) While the District continues to pay under protest, Searles and Mojave Pistachios decline to pay at all. Searles will continue to challenge the Replenishment Fee. (See, e.g., *Thompson v. Spitzer* (2023) 90 Cal.App.5th 436, 454-455.)

CONCLUSION

Authority does not have the power, nor should it be able, to *de facto* adjudicate groundwater rights and then extort a person or entity into paying unlawful fees or risk losing water. At the very least, such action should not continue while groundwater rights are subject to a pending adjudication proceeding, nor should Authority be permitted to hide behind the "pay first" public policy, as it does not apply here for the numerous reasons identified above.

The lower court will eventually decide the parties' respective groundwater rights in the pending comprehensive groundwater adjudication. In the meantime, both Mojave Pistachios and Searles have no meaningful and timely remedy to test the Authority's Implementing Actions, which allocate them no native groundwater. Mojave Pistachios and Searles are also faced with Authority's lawsuits to shutdown their

groundwater wells. This Court is required to provide interim relief until the lower court can make necessary groundwater rights determinations, even before the lower court decides whether Authority's actions are legally valid. Authority fails to adequately analyze applicable law, and this amicus curiae brief is submitted to provide further analysis on the issues raised.

For these reasons, Searles respectfully submits this amicus curiae brief in reply to the return.

Respectfully submitted this 16th day of June, 2023.

BEST BEST & KRIEGER LLP

By: /s/ Jeffrey V. Dunn
JEFFREY V. DUNN
ERIC L. GARNER
WENDY Y. WANG
SARAH CHRISTOPHER FOLEY

Attorneys for Amicus Curiae
SEARLES VALLEY MINERALS INC.

EXHIBIT 1

No. G062327

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION 3

MOJAVE PISTACHIOS, LLC, a California limited liability company, and PAUL G. NUGENT AND MARY E. NUGENT, Trustees of the Nugent Family Trust dated June 20, 2011

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent,

INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a California joint powers authority; THE BOARD OF DIRECTORS OF THE INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a governing body,

Real Parties in Interest.

Appeal from the Superior Court of the
State of California for the County of Orange
The Honorable William D. Claster | Case No. 30-2021-01187589

DECLARATION OF JEFFREY V. DUNN

BEST BEST & KRIEGER, LLP
Jeffrey V. Dunn (Bar No. 131926)
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Tel: (949)263-2600

Attorneys for Amicus Curiae Searles Valley Minerals Inc.

DECLARATION OF JEFFREY V. DUNN

I, Jeffrey V. Dunn, declare as follows:

1. I am an attorney licensed to practice before the courts of the State of California. I am a partner with Best Best & Krieger LLP, attorneys of record for Searles Valley Minerals Inc. ("Searles") in the above-captioned action. I have personal knowledge of the facts set forth below and, if called to do so, could competently testify to them.

2. This Court has wide latitude to consider "interested and responsible parties who seek to file amicus curiae briefs." (*Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 405, n. 14.) "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." (*Id.*)

3. This Court may accept facts outside the record that are presented by amici, such as Searles, if such facts are subject to judicial notice. (See *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal. App. 2d 139, 143-144 [taking judicial notice of proceedings of the Public Utilities Commission].)

4. Under Cal. Evidence Code 452(h), "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" are subject to judicial notice. Further, under Cal. Evidence Code 452(c), official acts of government are subject to judicial notice.

5. Attached as Exhibit "A" to this Declaration is a true and correct copy of a June 3, 2020, letter from Eric Garner of Best Best & Krieger, LLP to Craig Altare of the California Department of Water Resources. This letter is a government record, and the fact of its existence and content are not reasonably subject to dispute. Therefore, it is subject to

judicial notice and may be considered by this Court. (Cal. Evidence Code § 452(c), (h).)

6. Attached as Exhibit "B" to this Declaration is a true and correct copy of a May 22, 2023, letter from the Indian Wells Valley Water District ("District") to the Indian Wells Valley Groundwater Authority. This letter is a government record, and the fact of its existence and content are not reasonably subject to dispute. Therefore, it is subject to judicial notice and may be considered by this Court. (Cal. Evidence Code § 452(c), (h).)

7. In pertinent part, Exhibit "B" states: "As with all past payments, any fees paid or deemed paid by the District towards the Replenishment Fee are paid under protest pursuant to California Water Code section 10726.6, subdivision (d). District further requests that if the Replenishment Fee is found to be invalid, that any payments may be refunded to the District."

I declare under penalty of perjury that the above is true and correct.

Executed this 16th day of June 2023, at Anaheim, California.

/s/ Jeffrey V. Dunn
JEFFREY V. DUNN

EXHIBIT A

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Eric L. Garner
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June 3, 2020

Craig Altare
Chief, GSP Review Section
California Department of Water Resources
901 P Street, Room 213
Sacramento, CA 94236
Craig.Altare@water.ca.gov

Subject: Comments on the Indian Wells Valley Groundwater Sustainability Plan

Dear Mr. Altare:

Searles Valley Minerals Inc. (Searles) thanks the Department of Water Resources (DWR) for the opportunity to provide comments for consideration during your review of the Indian Wells Valley Groundwater Sustainability Plan (IWV GSP).

Searles is a minerals recovery and manufacturing company that uses a proprietary solution mining technique to selectively extract minerals from a brine solution that is recycled continuously through the mineral deposits found in Searles Lake. It is located in the town of Trona, San Bernardino County, CA. The manufacturing facilities are located in the communities of Trona and Westend which are separated by approximately five miles. The local communities in Searles Valley have depended on the industrial and municipal activities of Searles and its predecessor companies since the founding of the San Bernardino Borax Mining Company in 1873. The communities grew with the growth of those companies and many of the communities were owned by the companies who built the housing and amenities like stores, recreation halls, swimming pools, theaters and a railroad to support population growth.

Searles owns and operates five (5) extraction wells in the Indian Wells Valley that pump water from the Indian Wells Valley basin and transports that water to the Searles Valley area for industrial and municipal beneficial uses, including for Searles' mining operations, as well as to supply water through the Searles Domestic Water Company (SDWC) to Searles Valley communities wholly dependent upon that appropriated water for their domestic water supply. SDWC is a wholly-owned subsidiary of Searles, regulated by the CPUC.

Searles has actively participated in the IWV GSP development process and has representatives on both the Public Advisory Committee and the Technical Advisory Committee of the Indian Wells Valley Groundwater Authority (IWVGA), the agency responsible for developing and implementing the IWV GSP. Searles has submitted numerous written and verbal comments to IWVGA. A copy of our most recent comment letter to the IWVGA is attached to this letter as Exhibit A and the comments contained therein incorporated here by this reference.

SGMA legislation states "*It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater…"* and "*The groundwater sustainability agency shall consider the interests of all beneficial uses and users of groundwater, as well as those responsible for implementing groundwater sustainability plans."* The GSP developed by the IWVGA reflects neither of these two principles. Searles' concerns are primarily focused on the following:

1. Erroneous interpretation by IWVGA of water rights law with respect to Searles' water rights and relying on that erroneous interpretation in (a) analyzing issues related to the sustainable yield in the IWV GSP and (b) engaging in a determination of water right priorities in the basin which also violates the express legislative intent of the Sustainable Groundwater Management Act (SGMA).

2. Adoption of projects and management actions without taking compliance with the California Environmental Quality Act (CEQA) into account as part of the implementation timeline or the time it takes to obtain approvals or permits from other agencies. The IWV GSP describes many large, complex projects and actions that the IWVGA would like to implement. However, details are scarce and timetables are overly optimistic and unrealistic. The proposed schedule does not allow time for data to be collected and individual projects to be evaluated. It does not use sustainability indicators to evaluate project effectiveness. The proposed schedule of actions and projects is front loaded and does not allow time for groundwater users to prepare for any changes to their water usage or cost of pumping water.

3. Estimating the water budget, sustainable yield, sustainability goal and threshold estimates based on data that is, at best, incomplete. The GSP relies upon modeling scenarios from unstated assumptions and data inputs. In fact, IWVGA modeling scenario 6.2 forms the basis for prevention and/or mitigation of any undesirable results of groundwater pumping. However, there are noteworthy data gaps in the information used to build this model. The most significant data gap is in the range of estimates of groundwater storage. Data gaps also exist for groundwater levels throughout the basin, groundwater conditions in the El Paso sub-region, subsidence, TDS data, recharge amounts, pumping by de

minimis users and groundwater dependent ecosystems. In spite of the data gaps, the modeling scenario outputs were used to set many of the measurable objectives and minimum thresholds for the sustainability indicators. The inability to quantify the error inherent to gaps in the source data means the validity of modeling scenario 6.2 is indeterminate.

4. Lack of transparency in the modeling used to determine the water budget and sustainable yield for the basin. Despite repeated requests, specific data and assumptions that were used to develop model 6.2 have never been released to the TAC, PAC or members of the public. Beneficial users and members of the public offered to pay directly for additional model runs with updated data and information. All requests for transparency about the models and modeling process were denied or went unanswered by the IWVGA Board. Consequently, the uncertainty inherent in the input data, in the output from different modeling scenarios and the sustainability indicators chosen is never quantified and remains unknown.

5. Arbitrary imposition of Augmentation Fees that the small communities that rely on the basin water cannot afford. The GSP calls for immediate implementation of Management Action No. 1. This action will impact all groundwater basin pumpers except US Naval Air Weapons Station (NAWS), China Lake and de minimis pumpers. It calls for immediate implementation of Pumping Allocation Plans, a Transient Pool and Fallowing Program, but does so without providing any information about allocation amounts, fee amounts or specific information about the Fallowing Program. The IWVGA promised to provide this necessary information on, or before April 15, 2020 (section 5.2.1.7). They reneged on this promise and instead submitted their GSP to the DWR without providing any specific information in the plan about the requisite implementation details for Management Action No. 1.

6. Inadequate funding mechanism for the multitude of projects listed in the IWV GSP. The estimated costs for these large, multiyear projects are presented in GSP sections 5 and 6. Cost estimates are approximate and high and funding sources have yet to be determined. Pumping fees alone cannot cover the cost of these projects. The Indian Wells Valley is home to about 36,000 people. The major employer is the US Navy,from which the IWVGA does not intend to collect any pumping fees. The small basin communities cannot afford to pay for projects of this size without substantial government assistance. That potential assistance is not yet identified and hypothesized assistance is not necessarily available.

These concerns are further elaborated in the copy of the letter attached as Exhibit A. The concerns expressed in that letter remain in effect and are heightened following the IWVGA's adoption of the IWV GSP.

We understand that DWR's review of the submitted GSPs is not generally for the purpose of assessing water right claims contained in GSPs and that your review is primarily focused on the technical aspects of those plans. However, we believe the extent to which the IWVGA has relied on its interpretation of water rights law to formulate the IWV GSP warrants deeper examination by DWR.

To that end, Searles Valley would like to provide DWR with a brief overview of its water rights in the basin. This information was also provided in writing to IWVGA during and after the IWV GSP development process, copies of which are attached for your reference as Exhibit B and Exhibit C. Searles has appropriative rights and prescriptive rights to groundwater in the IWV basin. Searles' water rights have ripened into prescriptive rights due to the overdraft conditions in the basin and because Searles' pumping has met the legal criteria of notice, adversity, open and notorious, hostile and under a claim of right to establish a prescriptive right. Searles' rights date back to at least the early 1930's when land was purchased in the basin by Searles' predecessor in interest, American Potash & Chemical Corporation (APCC), containing a well that was drilled in 1912. APCC began transporting basin water to Searles Valley in 1942 through the China Lake gap area.

Searles' right to groundwater in the basin predates the rights of the other water producers including without limitation any water rights claimed by the Indian Wells Valley Water District (IWVWD), which was created in 1955, and NAWS. NAWS' water right dates to December 1947 when Congress took official action to reserve the land. Searles has provided the IWVGA with a written memorandum dated September 5, 2019 explaining this fact.

Under well-established federal law, any right to groundwater claimed or asserted by NAWS pursuant to the federal reserved water right doctrine has a priority date which vests on the date of the reservation. The date of the reservation is the time the land is taken out of the public domain by official Congressional action. Here that was December 1947, by which time Searles was already pumping substantial amounts of basin water. The amount of water reserved cannot include already appropriated water, like the Searles water here, and is limited to the amount necessary to accomplish the purpose of the reservation. (*Cappaert v. U. S.* (1976) 426 U.S. 128, 138-139.) Therefore, Searles' appropriative rights and prescriptive rights are earlier in time and have a priority over any water right reserved to NAWS.

Indian Wells Valley Water District was created in 1955. Because it did not begin pumping before 1955, its appropriative right to BASIN water is junior to Searles' appropriative and prescriptive rights. Therefore, because of the "first in time, first in right" prior appropriation doctrine, IWVWD has a priority junior to the water Searles had appropriated before IWVWD. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 279; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241; *Irwin v. Phillips* (1855) 5 Cal. 140, 147; *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 776; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961; *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 556.) Thus Indian Wells Valley Water District's appropriative water right in the basin is subject to and limited by Searles' pre-1955 water rights.

In addition to the above, Searles has been delivering basin water to SDWC since SDWC received its Certificate of Public Convenience in 1944, and has gradually become SDWC's sole source of domestic water. Domestic use of water has long been recognized under the law as the highest use of water, followed by irrigation. (Wat. Code, § 106.) This overarching principle applies no matter the priority right. (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 961.) At its core, this principle recognizes the human right to "safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." (Wat. Code, § 106.3.) The right to acquire and hold rights to water used for human consumption is protected under the law "to the fullest extent necessary for existing and future uses." (Wat. Code, § 106.5.) No court has ever prevented a municipal water system from pumping water for domestic uses because of a competing overlying right priority. Therefore, Searles' right to pump water in the basin for domestic uses is senior to any water right reserved to NAWS. Further, as stated earlier, because IWVWD began pumping in 1955 or later, its appropriative right to basin water remains junior to Searles'.

Searles continues to be concerned with IWVGA's position with respect to the basin's sustainable yield as reflected in the IWV GSP. In essence, the IWVGA is substantially reserving the sustainable yield to NAWS without regard to the other beneficial uses and users of the basin water. By way of example, Appendices 3-A, 4-A and 5-A of the IWV GSP show that NAWS intends to increase its baseline water consumption from an actual pumping rate of 1,450 AFY in CY2017 to a projected 6,530 AFY to support an undefined future growth of the NAWS mission. This represents a 350% increase in groundwater pumping and over 85% of the basin's sustainable yield.

Rather than considering "the interests of all beneficial uses and users of groundwater" as required by SGMA, the goal of the IWV GSP is "to preserve the character of the community, preserve the quality of life of the IWV residents, and sustain the mission at NAWS China Lake." No other beneficial uses or users are acknowledged as the goal, objective or purpose of the GSP

developed and presented to the DWR by the IWVGA. This deference to the interests of one stakeholder at the expense of other stakeholders violates SGMA.

We also would like to inform you that the IWVGA board has announced that it will be adopting extraction allocations of basin water shortly after the time period reserved by DWR for submittal of comments on GSPs. Therefore, Searles hereby reserves the right to submit further comments for DWR's consideration at that time.

We appreciate DWR's consideration of these comments. If you have any questions please contact me at (213) 787-2561 or eric.garner@bbklaw.com.

Sincerely,

Eric L. Garner
Managing Partner
of BEST BEST & KRIEGER LLP

ELG/mb

Attachments:

- Exhibit A: Searles Comment Letter to IWVGA, dated January 8, 2020.
- Exhibit B: Memorandum provided to IWVGA dated September 5, 2019, Re: Effective date of federal reserved rights.
- Exhibit C: Searles' responses to "IWVGA QUESTIONNAIRE 1"

EXHIBIT B

INDIAN WELLS VALLEY WATER DISTRICT

May 22, 2023

Indian Wells Valley Water District
100 W. California Avenue
Ridgecrest, CA 93355

Re: Replenishment Fee Payment Under Protest

Clerk of the Board:

This letter accompanies the Indian Wells Valley Water District's ("District") payment of the IWVGA Replenishment Fee in the amount of $225,654 for the month of April 2023 with a District Exempted Pumping Allotment of 4,390 A/F per IWVGA Ordinance 03-20. Per request of the General Manager of the Groundwater Authority and based on the approved apportionment of the Replenishment Fee, $1,854 of this amount is intended for the Shallow Well Mitigation Program.

Please be advised that I have been directed by the District Board of Directors to make monthly Replenishment Fee payments consisitent with a District Exempted Pumping Allotment of 4,390 A/F until an agreed upon procedure for future allotments is agreed upon.

As with all past payments, any fees paid or deemed paid by the District towards the Replenishment Fee are paid under protest pursuant to California Water Code section 10726.6, subdivision (d). The District further requests that if the Replenishment Fee is found to be invalid, that any payments made be refunded to the District.

If you have any questions, feel free to contact the undersigned at (760) 384-5555.

Respectfully,

Don Zdeba
General Manager

500 West Ridgecrest Boulevard ~ Mailing Address: P.O. Box 1329, Ridgecrest, California 93556-1329
(760) 375-5086 Fax (760) 375-0167
www.iwvwd.com E-mail: iwvwd@iwvwd.com

CERTIFICATE OF SERVICE

I, Eugenia Duran, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. My email address is: eugenia.duran@bbklaw.com. On June 16, 2023, I served the document(s) described as **AMICUS CURIAE BRIEF TO REPLY TO REAL PARTY IN INTEREST'S RETURN ON WRIT** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on September 1, 2022, from the court authorized e-filing service at TrueFiling. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

☒ BY MAIL: By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 16, 2023, at San Jacinto, California.

/s/ Eugenia Duran
Eugenia Duran

SERVICE LIST

Mojave Pistachios, LLC, et al., v. Indian Wells Valley Water District, et al.
Court of Appeal, Fourth Appellate District, Division 3, Case No. G062327
Superior Court Case No. 30-2021-01187589-CU-WM-CXC
[Consolidated Case No. 30-2021-01188089-CU-WM-CXC; Related Case No. 30-2021-01187275-CU-OR-CJC; Related Case No. 30-2022-01239487-CU-MC-CJC; Related Case No. 30-2022-01239479-CU-MC-CJC; Related Case No. 30-2022-01249146-CU-MC-CJC]

Scott S. Slater Robert J. Saperstein Amy M. Steinfeld Elisabeth L. Esposito **BROWNSTEIN HYATT FARBER SCHRECK, LLP** 1021 Anacapa Street, 2nd Floor Santa Barbara, CA 93101 Telephone: (805) 963-7000 Facsimile: (805) 965-4333 Emails: sslater@bhfs.com rsaperstein@bhfs.com asteinfeld@bhfs.com eesposito@bhfs.com	*Attorneys for Petitioners* **MOJAVE PISTACHIOS, LLC; PAUL G. NUGENT AND MARY E. NUGENT, TRUSTEES OF THE NUGENT FAMILY TRUST DATED JUNE 20, 2011**
John C. Murphy Douglas J. Evertz Emily L. Madueno **MURPHY & EVERTZ LLP** 650 Town Center Drive, Suite 550 Costa Mesa, CA 92626 Telephone: (714) 277-1700 Facsimile: (714) 277-1777 Emails: jmurphy@murphyevertz.com devertz@murphyevertz.com emadueno@murphyevertz.com James A. Worth **McMURTREY, HARTSOCK & WORTH** 2001 22nd Street, Suite 100 Bakersfield, CA 93301 Telephone: (661) 322-4417 Facsimile: (661) 322-8123 Email: jim@mhwlegal.com	*Attorneys for Real Parties in Interest* **INDIAN WELLS VALLEY WATER DISTRICT**

Derek R. Hoffman Byrin A. Romney **FENNEMORE DOWLING AARON** 8080 N. Palm Avenue, Third Floor Fresno, CA 93711 Telephone: (559) 432-4500 Facsimile: (559) 432-4590 Emails: dhoffman@fennemorelaw.com bromney@fennemorelaw.com	*Attorneys for Defendants in Related Case* **MEADOWBROOK DAIRY REAL ESTATE, LLC; BIG HORN FIELDS, LLC; BROWN ROAD FIELDS, LLC; HIGHWAY 395 FIELDS, LLC; THE MEADOWBROOK MUTUAL WATER COMPANY**
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Phillip W. Hall Deputy County Counsel **OFFICE OF THE COUNTY COUNSEL** **COUNTY OF KERN** 1115 Truxton Avenue, 4th Floor Bakersfield, CA 93301 Telephone: (661) 868-3826 Facsimile: (661) 868-3809 Emails: phall@kerncounty.com phall@co.kern.ca.us	
BY U.S. MAIL: Judge William Claster, Dept. CX104 Orange County Superior Court Civil Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701 Telephone: (657) 622-5303	**California Supreme Court [Electronic Service under Rule 8.212(c)(2)]**

Case No. G062327

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

MOJAVE PISTACHIOS, LLC, California limited liability company; and PAUL G. NUGENT AND MARY E. NUGENT, Trustees of the Nugent Family Trust dated June 20, 2011

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent.

INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a California joint powers authority; THE BOARD OF DIRECTORS OF THE INDIAN WELLS VALLEY GROUNDWATER AUTHORITY, a governing body,

Real Parties in Interest.

Orange County Superior Court Lead Case No. 30-2021-01187589-CU-WM-CXC

[Consolidated Case No. 30-2021-01188089-CU-WM-CXC; Related Case No. 30-2021-01187275-CU-OR-CJC]

PROPOSED AMICUS CURIAE BRIEF OF WESTERN GROWERS ASSOCIATION, CALIFORNIA FARM BUREAU FEDERATION, DAIRY CARES, AND AMERICAN PISTACHIO GROWERS IN SUPPORT OF PETITIONERS

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Attorneys for Amici Curiae
Western Growers Association, California Farm Bureau Federation, Dairy Cares, and American Pistachio Growers

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed under California Rules of Court, Rule 8.208.

Dated: June 15, 2023

By: Tracy J. Egoscue
Tracy J. Egoscue
Attorney for *Amici Curiae*
WESTERN GROWERS ASSOCIATION,
CALIFORNIA FARM BUREAU FEDERATION,
DAIRY CARES, and AMERICAN PISTACHIO GROWERS

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STATUTES

CERTIFICATION

No Party or counsel for a party in this appeal authored this proposed Amicus brief, in whole or in part, or made a monetary contribution intended to fund the preparation of submission of this brief. Moreover, no person or entity made any monetary contribution intended to fund the preparation of submission of the proposed amicus curiae brief, other than the Amici Curiae submitting this proposed brief, its members, and its counsel in the pending appeal. There are no interested entities or persons that must be listed under California Rule of Court 8.208.

Dated: June 15, 2023

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

INTRODUCTION

Western Growers Association (WGA), California Farm Bureau Federation, Dairy Cares, and American Pistachio Growers (collectively, Amici Curiae) file this Amicus Curiae brief in support of Petitioners Mojave Pistachios, LLC and Paul G. Nugent and Mary E. Nugent. The issues in this case are of great concern to Amici Curiae, as agricultural groundwater users rely on California common law principles of water law. Sustainable Groundwater Management Act (SGMA) requires local agencies to form groundwater sustainability agencies (GSAs), which are tasked with the development and implementation of groundwater sustainability plans (GSPs) to avoid undesirable results and mitigate overdraft within the corresponding groundwater basin.

In this instance the Indian Wells Valley Groundwater Authority (Real Party), as GSA, has developed and implemented a GSP that allocates native groundwater relying upon its own erroneous legal analysis of Petitioners' water rights. Additionally Real Party asserts that because the California Legislature has said that nothing in a GSP determines or alters groundwater rights under common law, *ipso facto* the Real Party's allocations

of native groundwater and legal analysis of water rights do not modify established water rights. This argument is a legal absurdity. Real Party's interpretation means that SGMA's prohibition on the GSP determining or altering groundwater rights essentially rubber stamps the GSP's ability to make arbitrary water rights determinations regardless of whether this is appropriate or results in a modification of those same rights under common law.

Real Party as the GSA also contends that if an action ends with a fee, everything leading up to it cannot be challenged without payment of the fee. According to Real Party, a GSA can insulate hostile and illegal decisions from challenge unless a farmer pays an exorbitant fee. This is inconsistent with California law. In fact, SGMA provides two avenues for fee-related challenges – only one requires the Plaintiff to "pay first." (Wat. Code, §§ 10726.6(c) and (d).) Real Party has set the fee at an amount out of reach of agricultural producers who have relied on their overlying water rights for decades—rights which were specifically protected by SGMA.

ARGUMENT

I. INTERPRETATIONS OF SGMA MUST BE CONSISTENTLY APPLIED AND IN ACCORDANCE WITH THE CALIFORNIA CONSTITUTION AND COMMON LAW.

California recognizes a landowner's overlying right as "the owner's right to take water from the ground underneath for use on his land within the basin or watershed." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1240.) Such an overlying right is based on the ownership of the land and is appurtenant thereto. (*Ibid.*) "The California Constitution and the Water Code make clear that the policy of this state is to put water resources to reasonable and beneficial use." (*Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal. App. 4th 326, 335, as modified (May 18, 2016).) Irrigation for agriculture is clearly a beneficial use. (See *City of Barstow v. Mojave Water Agency, supra,* 23 Cal. 4th at p. 1251.)

The purpose of SGMA, among other things, is "to enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution...[and] to preserve the security of water rights in the state to the greatest extent possible…" (Wat. Code § 10720.1, subd. (b).) Accordingly, SGMA prohibits GSAs from granting

allocations on the basis of water rights priority determinations. (Wat. Code, §§ 10720.1(b), 10726.8(b), 10720.5(b), see also 10738.) Pursuant to SGMA, the GSAs have no authority to adjudicate groundwater rights among owners. (Wat. Code § 10726.8 ["Nothing in this part shall be construed as authorizing a local agency to make a binding determination of the water rights of any person or entity…"].) Contrary to this statutory limit on its authority, the Real Party admits in its GSP that it made water rights determinations and that it determined that certain overlying landowners, including Mojave, held "inferior" rights and that other water users held "superior" rights. (See Petition, at pp. 21-22.) The superior court sustaining demurrers to these causes of action is contrary to California law and sets a devastating precedent for agricultural groundwater users given the Real Party's conclusion that agricultural use should not be considered a reasonable use of water. (See Petitioners' Third Amended Petition, at ¶ 98 [Memorandum from IWVGA Board Special Counsel James L. Markman to David Janiec re "Report from March 8 and March 29, 2019 Meetings on IWVGWA Allocation Plan" (April 1, 2019)].)

Real Party argues that the Annual Pumping Allocations it established are not determinations of water rights because the California Legislature has expressly declared they are not. (Return at p. 49.). Yet, the GSA has expressly determined that agriculture is to be allocated **none** of the native groundwater, effectively stripping overlying agricultural users of groundwater production rights.

In seeking to support its allocations of native groundwater, Real Party conducts its own analysis and conclusions as to water rights—a function that is specifically held by the courts. The Real Party's Return to Petition provides extensive arguments regarding Mojave's water rights (Return at pp. 14, 50, 54-60 [arguing that Mojave has lost its water rights to prescription]). Whether or not Mojave has altered water rights is not an appropriate inquiry, as the legitimacy of overlying water rights and priority determinations by GSAs was not intended under, or supported by, the provisions of SGMA.

The superior court order states that there is no interference with California groundwater rights when a GSA allocates groundwater because the allocation is not a permanent adjudication of groundwater rights performed pursuant to Code

of Civil Procedure §830, et seq. This is seemingly in response to Real Party's argument that: "[a]t the heart of Mojave's challenge is the unsupported presumption that Mojave has a "vested overlying water right to pump native groundwater from the Basin," without paying the Replenishment Fee. But, Mojave likely does not possess a water right". (Return at pp. 13-14.) This statement by Real Party regarding whether or not Petitioner Mojave as an overlying landowner and agricultural producer possesses water rights is contrary to law, and flies in the face of the requirements of SGMA.

A. Appellants' Petition is the Proper Venue to Challenge the Actions of the GSA

SGMA provides for judicial review of all GSA actions – an aggrieved party is not required to initiate a comprehensive basin adjudication to challenge a GSA's actions. (Wat. Code, § 10726.6, subd. (e).) Despite this, Real Party argues: "[i]f a party feels that its water rights have been improperly considered in the course of basin management, the party's remedy at law is to have the court in a comprehensive adjudication determine the existence and precise contours of those rights. (§§ 10720.5(c); 10737.)" (Return at 54.) Water Code section 10726.6, subdivision (e) provides that "actions by a groundwater sustainability agency are subject to

judicial review pursuant to Section 1085 of the Code of Civil Procedure," unless SGMA specifically provides for another cause of action.

The California Legislature did not intend for SGMA to become a tool used to strip landowners of their water rights. "In enacting this part, it is the intent of the Legislature to do all of the following: (a) To provide for the sustainable management of groundwater basins. (b) To enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution. It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater." (Water Code § 10720.1) (Underscoring added.) Water Code sections 10720.5, subdivision (c) and 10737, cited by the Real Party, simply provide that water rights in a groundwater basin subject to SGMA may be determined by a court in an adjudication action pursuant to CCP 830, et seq. These statutes do not insulate a GSA or Real Party from judicial review and challenge where it fails to comply with SGMA's provisions or other applicable legal authorities.

B. Real Party's Water Rights Determinations and Allocations Are Inconsistent With the California Constitution and State Statutes

Real Party's determination that agricultural pumpers hold "inferior rights" is factually and legally incorrect. Real Party's decision to provide zero allocations of native groundwater to agricultural producers is legally wrong (i.e., violates Water Code Section 106) and detrimental to the livelihood of agricultural producers in the state, impacting food production for the majority of the nation. Indeed, the GSA is bound to exercise discretion in accordance with Water Code Section 106. "Section 106 expresses a clear policy preference for domestic and then irrigation use…" (See *Abatti v. Imperial Irrigation District* (2020) 52 Cal.App.5th 236, 280-281.) Agriculture is an important staple of both the California and national economies. Agriculture is also important for the feeding of the population. Amici and Petitioner represent overlying agricultural landowners that grow, pack, and ship over half of the nation's fresh produce including nearly a third of America's fresh organic produce—all while using groundwater to support the farms.

II. THE PAY FIRST PRINCIPLE DOES NOT INSULATE A GSA FROM A CHALLENGE OF ITS WATER ALLOCATIONS.

This Court should reject the argument that the pay first principle insulates a challenge to a GSA's water allocations. A GSA should not be allowed to shield their allocation determinations from judicial review by cloaking them in a fee ordinance.

The application of "Pay First" here does not further the policy basis for the doctrine that payment is required to facilitate the continued provision of essential government services. (See *State Board of Equalization v. Superior Court* (1985) 39 Cal. 3d 633, 639.) The court should reject Real Party's legal arguments seeking to preclude judicial review of their actions under "Pay First" because a ruling in favor of the Real Party would encourage agencies to shield all manner of ultra vires actions by inclusion in fee ordinances.

A. SGMA Provides For Fee-Related Challenges Without Payment First

Within Water Code section 10726.6, the legislature permitted a limited window for challenges to GSA fee ordinances, which includes that "[a]ny judicial action or proceeding to attack, review, set aside, void, or annul the ordinance or resolution

imposing a new, or increasing an existing, fee imposed pursuant to Section 10730, 10730.2, or 10730.4 shall be commenced within 180 days following the adoption of the ordinance or resolution." (Wat. Code § 10726.6, subd. (c).) Subdivision (d) also provides that at any time after fee adoption, any person may pay a fee under protest and seek to recover the payment in superior court. The fee at issue is egregious, thwarts meaningful challenge, and sets a destructive precedent. Petitioners' challenge should be permitted to proceed without paying the fee.

III. CONCLUSION

Affirming the superior court's dismissal of Petitioners' challenge to the Real Party's GSP and allocation of native groundwater sets a standard and practice that not only subjects overlying agricultural groundwater users to potential confiscation of all groundwater production rights but also complete financial devastation from mandatory payment of egregious and insurmountable fees and costs associated with lengthy and expensive legal proceedings for a comprehensive adjudication of basin groundwater rights.

This case concerns the interpretation of SGMA and precedential authority over the water rights of overlying

landowners throughout California. Amici Curiae are significant owners of overlying groundwater rights within the State and are responsible for food production across the country.

As stated above, both California common law and the Constitution recognize a landowner's overlying right to take water for beneficial use such as irrigation of agriculture, and SGMA is not contrary to this established law as it prohibits GSAs from granting allocations and determinations of water rights. Indeed, it is a stated purpose of SGMA to manage groundwater consistent with the California Constitution and preserve the security of water rights in the state to the greatest extent possible.

For all of the forementioned reasons, the Amici Curiae respectfully request this Court reverse the superior court's granting of Real Party's demurrer and finding that Petitioner's writ is barred by the "Pay First" doctrine.

Dated: June 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(C) of the California Rules of Court, I hereby certify that this brief contains 2,615 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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